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No. 85-2006 and No. 85-1963

Supreme Court, U.S.
F I L E D

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
v. *Appellants,*

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

TYLER PIPE INDUSTRIES, INC.,
v. *Appellant,*

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the
Supreme Court of the State of Washington

**BRIEF OF THE COMMITTEE ON STATE TAXATION
OF THE COUNCIL OF STATE CHAMBERS
OF COMMERCE AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

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QUESTION PRESENTED

Whether a state's gross receipts tax system which imposes a tax on manufacturing and on selling activities but exempts from taxation the manufacturing activities of purely local manufacturer-sellers impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution?

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Appellants in the

above-captioned cases. Written consents of the Appellants and the Appellee have been obtained and are attached herewith.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 41 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 249 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which present issues significantly affecting state and local taxation of interstate commerce.

Member companies of COST conduct business in Washington, West Virginia and Indiana, and in many local taxing jurisdictions, such as Los Angeles and Philadelphia—all of which have gross receipts tax systems. This Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), made clear that, in determining the validity of a state's gross receipts tax under the Commerce Clause, the principle of "internal consistency" applies. Under this rule, a state tax must have an internal consistency such that, if the challenged tax were applied by every jurisdiction, there would be no impermissible interference with interstate commerce.

Washington's gross receipts tax at issue in this case is the mirror image of the West Virginia taxing system declared unconstitutional in the *Armco* case. Like West Virginia, Washington imposes a gross receipts tax on the

privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Similarly, Washington also imposes a gross receipts tax on companies engaged in the business of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. The Washington "multiple activities" exemption is the reverse of that found in the West Virginia tax scheme, exempting wholly intrastate businesses from the manufacturing tax instead of the selling tax. Washington manufacturer-sellers, who are taxed as wholesalers or retailers, are exempt from taxation as manufacturers. Wash. Rev. Code § 82.04.440.

The discriminatory effect in this case is identical to that found by the Court in *Armco*. Both gross receipts tax systems lack internal consistency. If the precise tax scheme of each state were projected into other states, as was shown in *Armco*, interstate manufacturer-wholesalers would be subjected to two gross receipts taxes while wholly intrastate manufacturer-wholesalers are assured of being subjected to only one such tax. The West Virginia tax system invalidated in *Armco* and the Washington taxing scheme here at issue both discriminate against interstate commerce in favor of wholly local, intrastate commerce. If the Washington Supreme Court had applied the "internal consistency" test prescribed by the Court in *Armco*, it would have been equally clear that the Washington gross receipts tax scheme is also unconstitutionally discriminatory under the Commerce Clause. The Washington Supreme Court, however, held that the Washington tax does not discriminate against interstate commerce, choosing to disregard the Court's decision in *Armco* as controlling precedent and relying instead on earlier cases in which the state's gross receipts tax withstood various commerce clause challenges because it was "unable to find . . . a command in the *Armco* decision" to "disregard earlier decisions not overruled." 105 Wash. 2d at 332.

Appellant interstate businesses in the "test case" before this Court, *National Can Corporation, et al. v. State of Washington, Department of Revenue*, No. 85-2006, are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon the Court's decision in *Armco*. The critical issue in all these cases is whether Washington's application of its Business and Occupation Tax, a gross receipts tax functionally indistinguishable from the West Virginia tax invalidated in *Armco* because it subjected interstate commerce to an unfair burden of multiple taxation not borne by local commerce, impermissibly discriminates against interstate commerce.

The decision of the Washington Supreme Court, in its disregard of the "internal consistency" test for establishing constitutionally impermissible multiple taxation burdens upon interstate commerce, is in irreconcilable conflict with this Court's decision in *Armco* and is inconsistent with prior rulings by this Court striking down discriminatory state taxes under the Commerce Clause. This case is indistinguishable from *Armco* and the conflicting decision below threatens to disrupt the current progress by the states toward assuring a reasonably consistent and fair system of taxation throughout the nation which will (1) allow each state to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the Constitutional rights of interstate corporate taxpayers.

SUMMARY OF ARGUMENT

A state's gross receipts tax scheme which subjects an interstate manufacturer-seller to multiple taxation not borne by a local wholly intrastate competitor constitutes an impermissible discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

ARGUMENT

THE WASHINGTON B&O TAX OPERATES DISCRIMINATORILY TO IMPOSE A BURDEN ON INTERSTATE COMMERCE NOT BORNE BY INTRASTATE COMMERCE

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court held that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce notwithstanding that local manufacturers making sales in the state were subject to a much higher manufacturing gross receipts tax. The West Virginia tax was found to be facially discriminatory because two companies selling tangible property at wholesale in West Virginia would be treated differently depending on whether the taxpayer conducted manufacturing in the state or out of it. The discriminatory effect on interstate commerce in favor of wholly local intrastate commerce was further demonstrated when the state's precise tax system was projected into other states:

"If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then *Armco* and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

This Court in *Armco* specifically rejected the view that actual discrimination against interstate commerce must be shown and adopted the principle of "internal consistency" in determining the validity of a state's gross receipts tax under the Commerce Clause:

"Appellee suggests that we should require *Armco* to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on *Armco's* competitors in West Virginia. This is

Business and Occupation Tax Law contains anti-doubling and selling in Washington, since the Washington by wholly intrastate local competitors, both manufactur-

This same burden of multiple taxation is not borne on wholesale or retail sales to Washington residents.

By gross sales receipts and Washington would levy a tax manufacture would exact a manufacturing tax measured interstate sales to Washington customers. The state of sions as Washington would be subject to two taxes on turning goods in a state having the same taxation provi-converge is also true. Out-of-state companies manufact-to both a manufacturing tax and a selling tax. The put sell their products outside the state would be subject in interstate commerce who manufacture in Washington were in effect in other jurisdictions, companies engaging sistency," test of *Armco*. If the Washington tax system State of Washington fails to meet the "internal con-Cam case show, the gross receipts tax imposed by the

As the stipulated facts in the record of the *National*

359 U.S. 349, 350 (1946).

of Taxes, 442 U.S. 432, 444 (1980): *Freeman v. Hewitt*, question. 19, at —. *Mobile Oil Corp. v. Commissioner*, the other states having nexus to tax the activities in ing complexities," or the "vagaries," of the tax laws of constitutionality of the tax would depend on the "shift-Any other rule, the Court noted, would mean that the

merce," 467 U.S. at 644.

on its face discriminates against interstate com-ilar rule applies where the allegation is that a tax reflect the business conducted in the State. A sim-the requirement that a tax be fairly apportioned to free trade. In that case, the Court was discussing there would be no impermissible interference with must be such that, if applied by every jurisdiction, be called internal consistency—that is the [tax] the Court noted that a tax must have "what might *Franchise Tax Board*, 463 U.S. 129, — (1983), not the test. In *Container Corp. of America v.*

urers (0.88%).

West Virginia tax exacted the higher tax on its in-state manufact-ington selling and manufacturing taxes were compensatory. In fact, two states, taxes and was the basis for the finding that the Wash- tion was perceived to override the obvious similarities between the (0.88%) than on manufacturing activities (0.57%). This distinc-on each activity. West Virginia imposed a higher tax on wholesaling schemes because, unlike Washington which imposes identical rates between the Washington and West Virginia gross receipts tax

The court below emphasized that an essential distinction existed

crimination against interstate commerce.

gins tax with the same result of impermissible dis- precisely the same manner as the invalidated West Vir- system imposed by the State of Washington operates in *Armco* and obscures the fact that the gross receipts tax emces", attempts to put aside the Court's decision in der the Commerce Clause on misstated factual differ- cision upholding the validity of the Washington tax un-

The Washington Supreme Court, in premising its de-

other state," 102 Wash.2d at —.

other tax at a different level of distribution in an- sibly be subjected to one tax in this state and an- manufacturing), while interstate businesses may pos- businesses pay only one tax (either wholesale or cative tax burdens; e.g., the fact that strictly local inherent in Washington's B&O tax results from dupli-

"Any direct commercial advantage to local businesses

by the court below:

"internal consistency," test of *Armco*, was acknowledged interstate commerce found unconstitutional under the cepts tax system in this case, identical to the burden on

The discriminatory effect of the Washington gross re- Wash.2d at —), as the court below acknowledged.

merce, of "two activities for the price of one," (102 able to taxpayer companies engaged in interstate com- wholly local intrastate businesses a tax benefit, unavail- The Washington gross receipts tax scheme provides inter-sellers an exemption from the manufacturing tax. taxation provisions by granting Washington manufact-

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Respectfully submitted,

Now should be reversed.

Commerce Clause of the United States and the decisions re-
tax system should be declared in violation of the Com-

For the foregoing reasons, Washington's Gross receipts

CONCLUSION

cases before this Court.

convenient the Armco holding should be struck down in the
Clause). For that reason, Washington's attempt to cir-
on interstate commerce prohibited by the Commerce
of the discrimination found similar to the type of discrimi-
tional under the Equal Protection Clause where the effect
than domestic insurance companies declared unconstitutional-
taxed out-of-state insurance companies at a higher rate
(1982) (Alabama's domestic preference tax law which
Insurance Co. v. Ward, — U.S. —, 102 S. Ct. 1216
1980, 459 U.S. 318 (1982); see also Metropolitan Life
(1981); Boston Stock Exchange v. State Tax Commis-
388 (1984); Maryland v. Louisiana, 421 U.S. 152
(1984); Westinghouse Electric Corp. v. Tully, 466 U.S.
(1984); Baccus Imports, Ltd. v. Diaz, 468 U.S. 263
business, " See Armco, Inc. v. Hardesty, 461 U.S. 638
... by providing a direct commercial advantage to local
a tax which discriminates against interstate commerce
State, consistent with the Commerce Clause, may impose
of Commerce Clause jurisdiction mandates that "[n]o
local interests, emphasizing that a fundamental principle
schemes which had the comparable effect of benefiting

This Court has repeatedly struck down state tax